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Date May 29, 1979

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Date May 29, 1979

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(Signature - Witness)

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AN INTERVIEW WITH:
Thornton G. Berry, Jr.

CONDUCTED BY:
Mark Pope

PLACE:
Charleston, West Virginia

DATE:
April 17, 1979

TRANSCRIBED BY:
Brenda Perego

MP: This is an interview with Thornton Berry, a former Chief Justice of the West Virginia Supreme Court of Appeals. The date today is April 17, 1979. My name is Mark Pope. We're in Judge Berry's law office in One Valley Square in Charleston, West Virginia. Judge Berry, I'd like to begin, if I may, just by asking you when and where you were born.

TB: I was born in Sutton, West Virginia, Braxton County, December 13, 1904.

MP: So, you are a native West Virginian then. You were born in West Virginia?

TB: That's correct.

MP: Did you live there very long?

TB: No, I didn't. When I was quite young we moved to Charleston, I went to grammar school in Charleston, West Virginia, then went off to prep school at Augusta Military Academy at Fort Defiance, Virginia. And, then to Virginia Military Institute in Lexington, Virginia, and I got my AB degree there in 1928. Then, in 1934 I got my law degree from Washington and Lee University. After that I went into law practice at Welch with the firm of Strother and Curd. I got \$75 a month, which is quite interesting when young lawyers now go into law practice and get \$15,000 or \$20,000 a year. Later I was taken into the firm and the name was changed to Strother, Curd and Berry. In 1939 I was appointed Assistant United States Attorney for the Southern District of West Virginia. I remained in that office, as well as in the firm, which could be done in those days, for about two years. In 1940 I was elected Prosecuting Attorney for McDowell County, West Virginia. I served in that office for about two years and then I went into the service in 1942 during the second World War. I stayed in the service for about four years, until after the war was over. I came out as a Lieutenant Commander.

MP: If I can back up and ask you about your early years, did you have any brothers and sisters?

TB: Yes, I had one brother, Edward Oldham Berry, who was also a lawyer, and one sister, Paulene Berry. Both of them are deceased.

MP: I see. Were you the oldest or youngest?

TB: I was the middle one.

MP: Now, you derived the biggest part of your education in Virginia, was there any reason for that? Was that just the will of your parents? They sent you off to Virginia?

TB: My family came from Virginia, originally from Berryville, Virginia, and then over the mountains into Braxton County many years ago. My grandfather, whose name was Thornton Berry, was a slave master on my great uncle's plantation, or farm, in Virginia, just a few miles from Augusta Military Academy. My great uncle's name was also Thornton Berry and my father's name was Thornton Berry. When the war between the states started, my grandfather went into the Southern Army, and later came into Braxton County, where he engaged in the mercantile business, and was Superintendent of Schools, I believe. I went to prep school at Augusta Military Academy in Fort Defiance, Virginia. Many of the boys from around this area of West Virginia attended Augusta Military Academy in those days, and still do, I understand. The people who ran the school at that time were Rollers, and Major Charlie Roller went to VMI and was a classmate of General George Marshall in the class of 1901. He was interested in boys going to VMI. The other Roller, Colonel Roller, went to the University of Virginia, and he was interested in boys going there. So, it was a split between VMI and Virginia, and, of course, a lot of them went to Washington and Lee and other colleges too.

MP: When you went to VMI, what kind of major did you pursue there? Was it a general course?

TB: I took liberal arts, because I intended to take law later, and that was a course that prepared you to take law. You might be interested in an anecdote about the schools in Virginia. I told you my grandfather worked on my great uncle's farm, which was close to Staunton. As I told you, he was in the Southern Army and was left on the battlefield to die. My great uncle Thornton Berry went out on the battlefield after the battle was over and as I understand it, the girl he later married also was staying there because she was teaching school in Staunton, Virginia, at Virginia Female Institute, which is now Stuart Hall. They nursed him back to health and he was later captured, I think, at Gettysburg, but he later married this girl that nursed him back to health after he had been wounded and left on the battlefield to die.

MP: That's an interesting story and it goes back even further into Virginia history. Are there any memorable courses or professors that you had at VMI that stand out in your mind now or was it just a good overall educational experience for you?

TB: It was a well-rounded education I obtained there and the professors were all competent. Professor Dixon, the professor of English, who later became Colonel Dixon, was quite helpful in the courses I took at VMI. I graduated in 1928 and the Depression started in 1929, which kept me out of school for a while, so I didn't finish law school until 1934, six years after I finished at VMI. The Dean of the Law School at Washington and Lee was a VMI graduate. He took his law at Harvard and they

accused him of proselyting and getting boys from VMI over to Washington and Lee Law School.

MP: OK. If I can follow up . . .

TB: By the way, he was from West Virginia. Charles Light was the Dean of the Law School and he was born at Martinsburg.

MP: You mentioned the Depression intervened between your undergraduate years and your college (law) years. Did that work a hardship on you, were you forced to work your way through school?

TB: It wasn't helpful. Those were bad times and the younger people in the colleges now just don't understand how bad the Depression was. It wasn't a recession, it was a depression. I took a job with the United States Fidelity and Guaranty Company as an adjuster in the southern part of West Virginia. I worked for them for a while and when I saved up enough money, I went back to law school. I ran out of money, so I left law school and came back here to Charleston and got a job with General Motors in the Insurance Department. The Insurance Department of General Motors was then called General Exchange Insurance Corporation. Now, it's called Motors Insurance Corporation. I worked for them for quite sometime and saved enough money to go back and finish my law.

MP: Judge Berry, what about in law school? Of course, you were familiar with Lexington by that time.

TB: Right. I spent a period of ten years there from the time I entered VMI to the time I finished at Washington and Lee.

MP: Are there any particular law professors? You mentioned the Dean, are there others that stand out in your mind?

TB: When I first went to Washington and Lee Law School, the Dean was William Moreland who was an outstanding professor. He impressed not only me but also other students. Later on, Charlie Light was Dean of the Law School. But, I expect of all the professors, Dean Moreland impressed me more than any other professor there. He was a gentleman and a scholar, as well as an excellent law teacher.

MP: Was the student body very large when you were in law school?

TB: No. I finished in 1934, as I told you, and there were 16 in our law class. Of course, they are much larger now, although that's a small law school and will be kept small. By the way, it's entirely different now. When I went there the law building was called Tucker Hall and I finished in June of 1934. It burned in October or November of 1934 and they built another Tucker Hall,

the same kind of architecture as the other buildings there. In 1976, one of the graduates of the law school gave nine million dollars to build another law school, now called Lewis Hall. His wife gave three or four million dollars for a law center. They don't have over 250 or 300 students in the school. Of course, it's designed for much more but they'll keep it small. The courtroom in that building is better than any courtroom in Virginia or West Virginia. The Circuit Court of Appeals of the Fourth Circuit held a regular court session in there about the time it was opened.

MP: I'm sure it was much more difficult for you to get back and forth from your home to Lexington. What's the road? Route 60 goes in there.

TB: Route 60 was used then as it is now. And, it isn't much better now than it was then. We went to school on the C&O. It backed up into some sidetrack to get us into Lexington, Virginia. But, that's the way most of the students went into Lexington in those days. And, it might be interesting to note, it was easier to get to Lexington, Virginia, from this section of West Virginia than it was to go to school in Morgantown. Of course, with Interstate 79, it's no trouble at all to get to Morgantown.

MP: I talked with a man earlier who said the same thing about Lexington, Kentucky. It was easier for him to get there, so he went to the University of Kentucky as opposed to going to West Virginia (University).

TB: That's quite true. And, since you mentioned the University of Kentucky, I also went to school there. Two terms in one summer. I didn't need the credits but Class A law schools required three full years of residence and I had been out some time at Washington and Lee, so in order to graduate, I had to go two terms, one whole summer and I selected the University of Kentucky to attend.

MP: After you finished your law studies, was there any particular reason why you returned to West Virginia? Did you have a position in a law firm lined up?

TB: That's quite correct. I had applied for and had a position with the firm of Strother and Curd in Welch, West Virginia. And as soon as I finished law school I went into that firm.

MP: And, what kind of practice were you involved in, a general practice?

TB: A general practice.

MP: Was that challenging to you after having been in law school? Was there ample work for you and so forth? Being in the Depression years?

- TB: It was during the Depression. There was sufficient work. Quite interesting to note that they sent me over to the courthouse to do some abstracts and I'd never been in the courthouse and hardly knew how to get in the building. I went over there and asked a few questions and finally got the hang of the thing. And, I thought if this is what the practice of law is, I don't think I want much of it. But after a while, it all fell in place.
- MP: What was the next step for you?
- TB: I might say that about the next thing I did, I married a girl from Welch. Rita Brewster who had gone to school at Randolph-Macon Woman's College in Lynchburg, Virginia, while I was at VMI.
- MP: She too had a Virginia connection.
- TB: You must remember that the eastern panhandle of this State and the southern part are close to Virginia and Welch, West Virginia, is farther south than Richmond, Virginia.
- MP: Of course, for many years we were Virginia.
- TB: That's quite true. Separation in 1863 - June 20, 1863. Mr. Lincoln was quite apprehensive, I should say, about making the State of West Virginia because of a provision in the Constitution which is still there which says that no state can be made out of another state.
- MP: I wonder what he did. Did he just do it under war panels?
- TB: He issued a proclamation making West Virginia a separate state. But when the vote came along, the story is, I guess it's true, that Union soldiers were in those counties and they voted instead of the citizens of the counties, especially in the eastern panhandle and the southern part of the State.
- MP: It would be interesting to do some research into that to see how we actually came to be.
- TB: The Constitutional Convention in this State was held in Wheeling, way up in the northern part which is farther north than towns in Pennsylvania.
- MP: I guess it's because of Mr. Lincoln's involvement in our becoming a State that they have his statue out there in front of our State Capitol.
- TB: That's one of the reasons. We also have a statue of Stonewall Jackson. And, when that statue was dedicated, about 1910, they had the two tall companies of Virginia Military Institute to come over here and dedicate it. A and F Companies and all the cadets were over six feet tall.

MP: Judge Berry, you practiced law for a while. At what point did you enter politics?

TB: After I got out of law school and came to Welch, I presume. All young lawyers get interested in politics and some people came to see me about running for Prosecuting Attorney and that was in 1936. I did and I got beaten. But, then I ran again and prevailed.

MP: How was it that you moved to Huntington?

TB: I didn't move to Huntington. I still lived in Welch. But my office headquarters were designated in Huntington because the United States Attorney at the time was a resident of Huntington. What I did, I still lived in Welch and practiced law in the law firm and then came to Huntington when they held Federal Court. In those days we held court in several places in the Southern District - Huntington, Charleston, Bluefield and Lewisburg. They no longer hold court in Lewisburg but they hold court in Beckley.

MP: Does West Virginia have a U. S. Attorney?

TB: It does. Bob King is now United States Attorney. He lives here. For the Southern District of West Virginia.

MP: I see. What about the northern part of the State?

TB: There's another United States Attorney for the Northern District. I forget his name right now, but I believe he lives in Wheeling. The Chief Judge of the Northern District is Judge Maxwell, who lives in Elkins.

MP: How did your service career enter in?

TB: Actually, I was Assistant United States Attorney before I was Prosecuting Attorney. After I served about two years as Prosecuting Attorney, the war started on December 7, 1941, and I entered the service in 1942, before my term was up as Prosecuting Attorney. I was in the service for four years, so when I came back, I was no longer Prosecuting Attorney. I started practicing law again in Welch.

MP: Can you tell us about your service career? Where were you stationed? What was your involvement there?

TB: I first went in at Quonset Point, Rhode Island, and went into the indoctrination course there. And, then I received orders to go to Pensacola, Florida, where I was in charge of a flight brigade battalion at Baren Field and also Whitting Field. And, then I received orders to go to Kodiak, Alaska, and I spent some

seventeen months in Alaska. I was stationed at Adak, Alaska, for awhile. It would be interesting to note here that Attu is the farthest island in the Aleutian chain. It was only 750 miles from the Japanese Island. And, of course, as you know, the Japanese took Attu and Kiska, and in the first part of the war, we killed all the Japanese on Attu. We went into Kiska. The Japanese there escaped into the Bering Sea in the fog and got away. We bombed the Japanese Island Paramamshuo from Attu during the war.

MP: Did you say you were in the Air Force?

TB: No, I was assigned to the Naval Air Branch. I wasn't a pilot at that time but later got a pilot's license.

MP: Did your training at VMI have any bearing on your career?

TB: Oh, yes. At Pensacola, I trained the cadets. I was in charge of the military phase of the training. And, later I was on the Missouri, the USS Missouri, the battleship that the peace treaty was signed on in Tokyo. I was on it for sometime and I was also on the Roosevelt, a carrier, for a period of time. I was separated from the service in 1946 and went back to Welch to practice law again.

MP: How long were you in Welch then, practicing law?

TB: I was in Welch, after the war, until 1958. I practiced law and was also Trial Examiner for the Workmen's Compensation Department during that time. In 1952 the Governor appointed me Judge of the Eighth Circuit. Then, I was later elected to the office of Judge of the Circuit Court of the Eighth Circuit. In 1956 I ran for the Supreme Court. I was defeated by an incumbent by about 400 votes. And, in 1958 I ran for the Supreme Court and won the election by over a hundred thousand votes. This was an unexpired term of six years and I ran again six years later for a twelve-year term. So, I remained on the Court for eighteen years. I didn't desire to run when that twelve-year term was over, and on December 31, 1976, I retired.

MP: Were you involved as a lawyer at all in World War II?

TB: Only with legal duties while I was in the service, additional duties. I was a line officer, but lawyer was on my record, so I acted as Judge Advocate on several occasions.

MP: You began practicing law again in Welch and you were appointed by the Governor and who was the Governor?

TB: Okey Patteson.

MP: Okey Patteson, to the Circuit Court. And, then you ran, as I understand, you ran and were elected to that office again

following the first term and then you sought the elective office of the Supreme Court.

TB: Yes.

MP: Now is that still an elective office?

TB: Yes. Both of them are. I was appointed because the Judge of the Circuit Court died. The Governor appoints the Judge to fill the vacancy, until the next election, so that's the reason I was appointed to an unexpired term as Circuit Judge and then ran for the full term. I ran for the unexpired term on the Supreme Court which was six years. I was elected to that office, and six years later I ran for a full term of twelve years.

MP: Let's talk about your time on the Circuit Court. You obviously wanted to be a Circuit Judge. Was that a rewarding position at the time for you?

TB: Yes it was. It was extremely interesting and I kept quite busy. During the time I was Circuit Judge, under the judicial system of that time, the judges could agree with another judge and hold court in another circuit instead of being assigned as they are now under the Judicial Reorganization Amendment. They couldn't get another judge to try a difficult case in the northern part of the State in the First Circuit. I went up there and tried a case that involved the disbarring of two attorneys and I spent considerable time in the northern part of the State at New Cumberland, Hancock County.

MP: What was your experience with the violence in the coal fields in southern West Virginia, that one often hears about?

TB: Well, when I went to Welch all of that trouble had subsided and there was very little difficulty of that type. The difficulty you're talking about was around the 1920's and it occurred in this section of the State, in Kanawha County, rather than in McDowell County and in Logan County. They had what they call the Battle of Blair Mountain. Deputy Sheriffs were shooting on one side and the miners were shooting on the other and they had to call federal troops into West Virginia. It was a bad situation. One of the people at that battle, Bill Blizzard, with the mine workers, was later tried for treason in the eastern panhandle. When I went into the southern part of the State, there was very little difficulty except for the fact that the United Mine Workers were organizing that area. That was after Franklin Roosevelt was elected President. They did have a little trouble at that time, but later the coal fields were organized and there was very little difficulty or bloodshed -- that had occurred years before. Very little of that occurred all the time I was down there and as far as I know, there's none now.

- MP: But you mentioned that you were involved with Workmen's Compensation even as a lawyer. Large parts of society are involved with coal mining operations.
- TB: It's the main industry in the southern part of the State.
- MP: So, you did get exposed to that kind of legal environment with the mining interests and miners, etc. Did that represent a lot of the kinds of cases that you were involved with as a Circuit Court Judge?
- TB: Well, the compensation cases didn't because they were handled by the Trial Examiner. They were all lawyers of course, and still are, through the Compensation Department, and then they went directly to the Supreme Court. The Circuit Courts then, and now, are not involved with the compensation cases as such. They go to the Workmen's Compensation Commissioner, from there to the Workmen's Compensation Appeal Board and then to the Supreme Court.
- MP: So, what kind of cases did you generally handle there?
- TB: I handled insurance cases and personal injury cases and cases involving coal companies that were operating in that part of the State.
- MP: So that was very educational for you, no doubt. For your future years on the . . .
- TB: That's right. We handled all types of law cases when I was practicing law and it was very beneficial when I was on the Supreme Court and on the Circuit Court, too.
- MP: So, one of the justices of the Supreme Court died and you sought his office?
- TB: That's correct.
- MP: You had had experience as a lawyer, as a judge -- you had a good legal education. Did you feel at that time that you were ready for that and you were qualified?
- TB: Yes, I thought with the experience I had, that I was qualified to be on the Supreme Court, and it turned out that I had very little difficulty. At the time I went on the Supreme Court, there were older judges who were former circuit judges, trial judges and one former attorney general. It was, at that time, considered an honor to be on the highest court in the State. I don't know whether it's considered that way now.
- MP: Was work on the Supreme Court similar to having been a judge on the Circuit Court?

- TB: Well, it was similar in certain respects and it was different in others. No trials are held in the Supreme Court. That is, no witnesses testified as they did in the trial court or the Circuit Court. That part was different. But, when I was a circuit judge, which was before the reorganization of the judicial system, the Circuit Judges were appellate judges, and they had inferior courts, statutory courts and also did trial work, which was beneficial. Of course, there were changes by the Judicial Reorganization Amendment, and now the Circuit Judges are no longer appellate judges. There is a provision in the Judicial Reorganization Amendment for intermediate appellate courts if the Legislature desires to set them up, but there's no intermediate appellate court at the present time under the reorganization amendment.
- MP: So, it goes from the Circuit to the Supreme Court of Appeals.
- TB: That's right. They do at the present time - appeals go directly to the Supreme Court. Now, on the Supreme Court, only appellate cases are handled, except for the extraordinary proceedings, such as, mandamus, prohibition, habeas corpus. The Supreme Court has original jurisdiction for those cases. However, under Rule 18, which is a questionable rule, the Supreme Court has held, that because they were inundated by original jurisdiction cases, they must first go into the Circuit Court or trial courts except in unusual cases.
- MP: You mentioned mandamus, habeas corpus, there are institutions in American law that we derive from the English legal system and our whole English legal heritage. Has there been a separation from the common law in your legal career?
- TB: You mentioned the extraordinary proceedings of habeas corpus, etc. These are not only involved in common law but also they're involved in the Constitution and also statutes providing for them in this State. Now, the law, of course, changed considerably. That's what you're talking about. We still have the common law, and the common law is nothing in the world but prior decided cases. In recent years, especially the last two or three years, there have been any number of cases overruled. And, the law is entirely different in some respects because those cases have been overruled. I was at the West Virginia University Law School recently lecturing to the law students, and one of the professors said you might as well throw out the 156 volumes of West Virginia Reports. The law is entirely different now. It's been changed (laughter).
- MP: Is that true?
- TB: No, not altogether. Some of it was partially facetious, but what he was talking about was so many of the prior decided cases are no longer law. Take for instance, the case that occurred in Kanawha

County some years ago, State against Angel. The accused had a babysitter in his home and he stabbed the babysitter 46 times and killed her -- a terrible case. It was tried in a Circuit Court here in a lengthy trial. The jury convicted the defendant of first degree murder. He appealed to the Supreme Court and I wrote the decision affirming the trial court. And, in the opinion, I said that several errors had been assigned, and one of them was Instruction No. 4, dealing with instructions to the jury that where malice is presumed with the use of deadly weapons. And, then a habeas corpus petition was filed recently in the Circuit Court of Kanawha County and it was held that, if there was error, it was harmless error. It was later held by the Supreme Court, where malice was presumed, there was a violation of the Constitution. This habeas corpus proceeding was appealed to the Supreme Court, and they sent it back and said it wasn't harmless error. So, the man will have to be tried again. What was the law then is not the law now.

MP: Well, that brings up the question of your personal judicial philosophy, both as a justice and chief justice. To what extent did you find yourself bound by stare decisis, precedents, etc.?

TB: Well, any appellate court must be governed by precedents and that is merely governed by the common law. That's the law of this State until it's changed either by the Legislature which is provided for in the Constitution or can be done by the Supreme Court. It's true that you're governed by them and the law changes. And, the Court, when I was on it, overruled some of the prior decisions because the law was changing. But, they're doing it much more so now, and they're making the law quite difficult in this process. Now, that there's been so many of the former cases overruled, the law is now in an unsettled status, you might say, because of this fact. But, law always changes. It never stays still. Even the common law, as I said, changes. It's made by the courts and when the courts decide that former cases are no longer proper, they change the former common law, and the new decision becomes the common law.

MP: You mentioned that you wrote the opinion in this one case that you were talking about. How were those responsibilities designated within the Supreme Court? Did the Chief Justice assign the individual who would write the opinion?

TB: Yes, and I think that's still true. The cases that are appealed to the Supreme Court are appealed from the Circuit Court by petition, of course. First filed in the trial court and after the case is filed in the Supreme Court the Clerk of the Supreme Court assigns it to the law clerk who presents it on Monday to all the judges and they vote as to whether to let it in. You don't get into the Supreme Court of West Virginia as a matter of right. If three judges vote to let the case in, it comes in, is filed and put on the docket. And, after it's argued, it's assigned by the Chief Justice to one of the justices in rotation to write an opinion and after he writes the case, it's brought

out to the Conference Room and all the judges consider it and any errors are corrected, etc., and it's handed down, usually on Tuesday morning. And, if any judges don't agree with it, they can write a dissenting opinion.

MP: I looked through some of the Southeastern Reporters in our library.

TB: All West Virginia Reports are printed in Southeastern Reports which are published by West Publishing Company. The Southeastern Reports are decided cases in four states, Virginia, West Virginia, North Carolina and South Carolina.

MP: And Georgia.

TB: And Georgia -- five instead of four.

MP: Is that just kind of an arbitrary grouping by West Publishing Company or is there some significance?

TB: Yes, it is. It's a geographical grouping, all over the United States of certain states in certain circuits. And, the federal courts usually go by those circuits too, by those groupings. They don't have to, but they do.

MP: Is the State of West Virginia because they're grouped in with those other four states, is there any relationship at all in terms of legal?

TB: Yes, the laws in those states are supposed to be quite similar. They're closely related. They are not contiguous, but they're closely associated geographically, and the laws in those states are quite similar, and have been developed throughout the years. The Supreme Court uses cases from all over the United States. Those opinions that are published in the Southeastern Reports are also published in the West Virginia Reports. The Attorney General of West Virginia is the reporter for those opinions.

MP: What does that mean?

TB: Well, under the old constitution he was listed as a reporter. His office at that time collected all the opinions and was responsible for publishing them in bound volumes of West Virginia Reports.

MP: How did you become Chief Justice of the Supreme Court?

TB: For years the head of the Supreme Court was called President, which came from way back, and perhaps West Virginia was one of the few, if not the only state, that designated the head of the Supreme Court as President. And, then several years ago, about a couple of years before the Constitutional Reorganization Amendment was approved, a statute was passed changing the name from President to Justice and Chief Justice. Then later, when the

Judicial Reorganization Amendment was approved by the people, in that amendment, the judges on the Supreme Court were designated as Justice and Chief Justice. It might be interesting to note that I was the first Chief Justice under the statute and I was the first permanent Chief Justice under the Judicial Reorganization Amendment, which didn't provide for a permanent Chief Justice, but when I was on the Court, we entered an order electing a permanent Chief Justice.

MP: The Court itself elected a Chief Justice?

TB: That's right.

MP: And, how long were you Chief Justice?

TB: I was Chief Justice for several years - first under the statute and later under the Judicial Reorganization Amendment.

MP: How influential is the Chief Justice in West Virginia?

TB: Well, I think that depends on the individual. Each of the justices is an individual, and they're all elected in this State. And, the Chief Justice is the head of the Court. And, if he's a strong individual, he may have quite an influence on the Court. If he's a weak individual, he'd have very little influence and another thing, it depends on the other justices. If they are strong individuals and activists, etc., they may object to even having a Chief Justice. So, it depends on the individual, the Chief Justice and the individual justices as to how much influence the Chief Justice has.

MP: The common law tradition is thought to give a lot of attention to individuals. Cases come to the Court on an individual basis. Do you feel that the role of the Court should be to interpret and apply the laws made by the Legislature on an individual basis that come before the Court?

TB: Yes. What you're referring to is activist judges which I mentioned a minute ago. Courts should not make the law. They should interpret the law and when they start trying to make the law, you get confusion which we have quite a bit of now. They'll overrule prior decided cases which you were referring to in the common law. Now, not only do the states have the judicial, the legislative and the executive branches, the Federal Government also has them. And, it's a check and balance. One checks the other. The Legislature makes the law or should make it. That's its duty. The courts interpret the law and the executive executes the law and that's the way our form of government is supposed to function. Now, for some years, it's quite true that the Judicial Department of government has been making the laws, which they shouldn't do. And, the reason for it is that the Legislative branch, which is charged with the duty of making laws, has lagged behind, and has not made laws because of political

reasons that they should have made, and the courts have stepped in and have made the law, which I say they should not, that's not their function. They should interpret the law and not make it.

MP: Do you as a judge try to keep yourself apart from the political process?

TB: Yes, I did. When I was on both the Circuit and the Supreme Court, under the Canons of Judicial Ethics, judges should not participate in political matters. Now, some of them don't follow the directions of the Canons. They should do it. And, it's improper for them not to do it. Now, it's true that perhaps before you can be a judge you must be involved in political matters, both in the state and federal systems. But, after you go on the bench, you should not participate in political matters, and I didn't. I tried to keep out of them. After I retired, it's entirely different and I participate in political matters. If I was called back, and you can be recalled under the Judicial Reorganization Amendment, you're only paid three-fourths of your pay. A judge should not participate in political matters. (Telephone rings.) In connection with judicial activism, there's a classification of judges called liberals. Now, it's true that some judges are extreme one way and extreme another and they may be classified. I never thought I was a conservative or a liberal -- I thought I was a moderate. In other words, I had no compunction about overruling former cases when I didn't think they were applicable to the present time. But, some judges are extreme and want to be known as the most liberal judges in the country, and they just like to upset the law. And, it causes confusion. The trial courts don't know what the law is in order to try cases and the lawyers don't know how to present them to the trial courts. It is a bad situation when you have confusion in the law, when so many cases are overruled in a comparatively short time.

MP: This no doubt happens on the federal level too?

TB: It also happens on the federal level. They accused the Warren Court of being an activist court and the label was probably justified. Because in the Brown against Education case, they overruled the former case of Plessy against Ferguson, and that and other cases they overruled caused quite a confusion in the law. The Miranda case and many other cases in the criminal field changed the law from what it had been. They said the Constitution meant a different thing at that time than it had meant at another time.

MP: I just did a paper on that and it was interesting to see their reasoning. They didn't have a lot to say about precedents. They talked mostly about social reasons and social factors.

TB: It wasn't based on precedent. It was based on a book that was written on . . .

MP: The effects of segregation.

TB: Segregation.

MP: Judge Berry, are there any memorable cases that you tried that stand out in your mind that were particularly rewarding to you?

TB: One of them wasn't very rewarding. I tried to go by the law, whether I liked it or not, to make it stable. They had a case in West Virginia some years ago, two cases - State ex rel Myers against Wood, involving about a hundred indictments of former and maybe present officeholders, involving corruption. The case was assigned to me. I didn't vote to let it in, but it was let in by a majority of the Court. I studied the case thoroughly and I was convinced that the indictment was void, and I voted to hold it void and threw it out and in so doing, about a hundred indictments were thrown out. The reason for so doing was the title to that Act didn't have the provision for this criminal offense in it and the statute, it was a civil statute, had a criminal statute in the Act itself, which wasn't referred to in the title. It was written in such language that anybody that did anything for the benefit of West Virginia could be sent to the penitentiary. It was loose language and the criminal statute incorporated in the civil Act was probably bad. In writing the case I didn't hold it unconstitutional because you don't hold, as a rule, two things unconstitutional in the same case. I referred to it and sloughed it off by saying it ought to be written in better language. It would have been a bad situation to put somebody in the penitentiary under that statute. It went against my grain to write the opinion, deciding that all those people couldn't be tried. They couldn't be tried because the indictment was bad. In the State ex rel Carson against Wood was a companion case, that I dissented in, dealing with the same things, but the indictment in that case was good. The evidence that may come in later may cause the accused or defendant not to be guilty. It might have been that they would have had to have a directed verdict, but the indictment was good so I dissented in that case. People who didn't understand the law thought that was horrible, but it just goes along the lines I was talking about. Whether I liked it or not I voted in that manner because I thought that was the law. I did it then, and I'd do it again.

MP: That says a lot about your stand and your firmness. What's the role of a judge, let's face it. You're going to have to interpret the law and take the consequences.

TB: That's exactly right and if you don't want to do that, you should resign and get off the bench. If you're not going to conform to what a judge should do, you shouldn't be a judge. And, any judges now that don't conform to the law and cause any embarrassment by their actions to the people of West Virginia should resign or be removed.

MP: In the Judicial Reorganization Amendment, which I have heard about from other sources, what was your connection with that and what were your motivations?

TB: Well, I advocated judicial reform for quite some time and we got a unified court system in the Reorganization Amendment. The American Judicature Society advocated this for years and years and put on seminars in West Virginia. We didn't get everything in the Judicial Reorganization Amendment we wanted. There is no provision in the Amendment for removal of judges, only for disciplining, such as reprimanding them, etc. And, there should be some provision for removal other than impeachment as provided in the Constitution, which is quite difficult to do. There have been very few federal judges impeached, and as far as I know, no judges in West Virginia have been impeached.

MP: As Chief Justice, how did you try to balance your time? In view of your study of cases and the public demands upon you, did you find that almost every hour of your time was used?

TB: No, but it was quite busy. It is quite true that I made talks on judicial matters in various parts of West Virginia. And, in other matters relating to the judicial system, which a judge should do, and for over a hundred years, in the State they have done so. But, they shouldn't participate in matters outside the judicial system. As far as that's concerned, judges under the judicial canons of ethics shouldn't be directors of banks and other businesses. We have had judges, and still have, who are directors. However, the Judicial Council, dealing with judicial matters, should have judges as members and they have been for a hundred years in this State. The reason I mention this is because there is a controversy with regard to this matter now in this State. I notice the papers have said that judges are on certain commissions they shouldn't be on because of certain language in the Constitution, which is exactly the same as it was in the Constitution of 1872. It has been the practice for judges to be appointed to commissions dealing with judicial matters for over a hundred years in this State. However, they shouldn't take appointments for matters not dealing with judicial matters.

MP: Did you have time to pursue other kinds of studies? Are there other interests you had as a private citizen?

TB: Oh, yes. You have to read about what is going on in the world in news magazines, as well as keep abreast of legal matters. You need to do this in order to know how to handle cases and dispose of cases. Getting back to the disciplining of judges, I think they should be disciplined if they don't conform to what a judge should do. And, I think the judicial system we set up here originally in this State wasn't perfect but it was very good and it should be used and carried out. Of course, you must remember that a lot of people don't like judges, because judges can't decide cases for both sides. This can only satisfy 50%,

or half, of the people and when you decide a case against a party, they may not like it and may report a judge for disciplinary purposes and they must be carefully investigated and thrown out when there's no rhyme or reason for disciplining a judge because somebody doesn't like him. But, when they don't do what they should do, then they should be disciplined.

MP: Do you think West Virginia has an effective judicial establishment? Are you optimistic about the direction that West Virginia is going in?

TB: Yes. It's much better than it used to be, but there's much room for improvement.

MP: From your perspective, from years of law practice and being a judge in West Virginia, if there are improvements to be made, what kind of things could be done?

TB: Well, I think there should be an improvement in the manner and method in which judges are selected in West Virginia. As you know, they are not elected in many other states - they are appointed. But, they are elected in this State. The people who vote for them don't know anything about them and there should be some method used to advise the people as to the qualifications of the people who are seeking the office of judgeship in the State of West Virginia. The present Constitutional Reorganization Amendment provided for nonpartisan selections of judges. That's not the entire answer but I think that would be a step in the right direction. In the past Legislature, the Senate passed the bill for nonpartisan selection of judges but it was killed in the House. I think it would be well to have that and then I think that the Bar should provide some method to evaluate the candidates for judges in the State of West Virginia. And, there should be some method of telling about their past and what they've done. Anybody who runs for public office, such as governor, the people know all about what he's done. They don't know anything about judges when they run for any judicial office. So, you can easily set people who are not qualified on the benches in West Virginia on the Supreme Court and on the Circuit Court.

MP: Judge Berry, we appreciate it very much. This brings this interview to a close.